

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 22, 1996

TO: Veronica Clements, Acting Regional Director, Region 27

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: U.S. West Communications, Inc., Case 27-CA-14807

133-0100, 530-6067-6067-2300, 530-6067-6067-5200, 530-6067-6067-8150

This Section 8(a)(5) "confidential information" case was submitted for advice on whether the Employer was privileged to refuse to provide the Union with the names of witnesses in its EEO investigation of a unit employee whom the Employer subsequently discharged for alleged sexual harassment.

This case arose after the Employer discharged employee P.M. for alleged sexual harassment. The complainant was another employee who alleged that P.M. had pinned her and rubbed against her in an elevator. ⁽¹⁾ The Union requested that the Employer provide a copy of its EEO investigation to assist the Union in processing P.M.'s discharge grievance. The Employer provided a summary of its investigation, including the substance of several witness statements. The Employer deleted the names of all witnesses except those of the complainant and her daughter.

The Employer declined to provide the names of witnesses claiming the need for confidentiality to encourage employees to file EEO complaints, to speak openly during an EEO investigation, and to avoid even the appearance of impropriety. In particular, the Employer noted that, prior to interviewing the witnesses, the Employer had read aloud to each witness a "confidentiality statement" containing the following assurance: "To the extent reasonably possible, I will not disclose your identity or identifying details given to me in your responses today, during the course of this investigation." In this regard, the Employer notes that EEOC policy directs employers to ensure confidentiality during an EEO investigation. ⁽²⁾

The Employer's summaries of witness statements indicated that one witness claimed a similar experience on an elevator with P.M. Other witnesses claimed that P.M. had grabbed a female witness, that P.M. had bragged about the size of his penis, and that P.M. stared at the breasts of female witnesses during conversations. The Region asked the Employer whether it intends to call any of these witnesses to testify if the discharge grievance resulted in an arbitration hearing. The Employer's counsel has refused to indicate whether or not the Employer will call these witnesses to testify.

We conclude that the Region should dismiss this charge based upon the following analysis.

Generally, "an employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined." *Boyertown Packaging Corp.*, 303 NLRB 441, 444 (1991) and cases cited therein. "[I]n dealing with union requests for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer." *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1105 (1991).

In *Pennsylvania Power Co.*, *supra*, the Board considered when an employer must provide a union with the names of informants who reported employee drug dealing and drug use. The Board stated that the employer must demonstrate that its confidentiality interests are "legitimate and substantial," and even then the employer "has a duty to seek an accommodation." The Board further stated, 301 NLRB 1107, fn. 16, that an employer cannot claim a confidentiality interest in the identity of the informant where the employer "plans to have them testify." The Board balanced the competing interests and found that by virtue of the employer's need to create a drug free environment, the employer's interests were "entitled to unusually great weight." The Board accordingly did not require the employer to reveal the names of the drug informants.

In Associated Wholesale Grocers,⁽³⁾ the employer declined to provide the union with the names of witnesses in a similar EEO sexual harassment investigation. The employer there had similarly provided its witnesses with assurances of confidentiality in accord with the EEOC's policy of confidentiality. The employer also similarly provided the union with summaries of the substance of witnesses' testimony. Advice concluded that the employer in that case had demonstrated a "legitimate and substantial" confidentiality interest. Advice also concluded under Detroit Edison⁽⁴⁾ that the employer otherwise had attempted to accommodate the union's interest in the information by providing a summary of the witnesses' testimony.

We conclude that Associated Wholesale Grocers essentially controls the instant case, subject to the following condition. The Board noted in Pennsylvania Power Co., *supra*, that an employer cannot claim a confidentiality interest in the identity of an informant where the employer "plans to have them testify." In that case, there was no evidence that the employer there intended to call its witnesses at any future arbitration hearing. In contrast, counsel for the Employer here has declined to state whether or not he or she may call these witnesses to testify.

Thus, there currently is insufficient evidence to show that the Employer intends to call these witnesses in which event the Employer could not claim confidentiality under the rule in Pennsylvania Power Co., *supra*. The Region therefore should dismiss this charge informing the parties that, given the Employers position concerning potential witnesses at any arbitration, the Region will consider the Union request as ongoing, and that the instant charge is subsequent to reinstatement on a showing that the Employer intends to call the confidential witnesses at any arbitration and has failed to supply the names of those witnesses.

B.J.K.

¹ The complainant initially told a Union steward about the alleged elevator assault. The steward allegedly replied that three or four other women had suffered similar experiences in an elevator with P.M.

² The Employer cites "EEOC Policy Guidance: Sexual Harassment", wherein the EEOC directs employers to "ensure confidentiality as much as possible" to both victims and witnesses in an EEO investigation.

³ Case 17-CA-17892, Advice Memorandum dated June 7, 1995.

⁴ Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979).